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No. 97-1431

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

COLIN LINDSAY, EXECUTOR OF THE ESTATE OF PEDRO SOSA, DECEASED,

Petitioner,

v.

JEFFERSON COUNTY AND JEFFERSON COUNTY DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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In their Brief in Response to Petition for Writ of Certiorari, Respondents, Jefferson County and the Jefferson County Department of Corrections, adopt the Sixth Circuit's erroneous interpretation of *Board of County Commissioners v. Brown*, 520 U.S. ___, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). As a result of this erroneous interpretation, Respondents advance several arguments that are inconsistent with *Brown*.

First, Respondents argue that, in the absence of evidence of a pattern of constitutional *injuries* similar in nature to those suffered by Sosa, there can be no evidence that Jefferson County was deliberately indifferent to an obvious need for change. Resp. Brief at 11. By focusing on the nature of the *injury* rather than the unconstitutional *conduct* of the corrections officers, Respondents misconstrue the rule set forth in *Brown*. Respondents' interpretation of *Brown* would allow municipalities to acquiesce to infinite constitutional violations, so long as municipal employees inflicted different types of injuries. Under *Brown*, the focus is on the propensity of an officer to use excessive force, whatever the form.

Second, Respondents deny liability on the ground that "Petitioner did not and could not prove the existence of a Jefferson County policy stating that officers would not be disciplined for the unconstitutional use of inmate restraints or for the unconstitutional use of excessive force." Resp. Brief at 11. Petitioner has never claimed that Jefferson County officials would be so bold as to create a written policy affirmatively approving constitutional violations. Instead, Petitioner has argued, consistent with

prior opinions of this Court, that Jefferson County's repeated failure to effectively discipline the unconstitutional use of force amounts to a policy of acquiescence. Indeed, as this Court has stated, the "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability." *Brown*, 520 U.S. at ___, 117 S. Ct. at 1390, 137 L. Ed. 2d at 641.

Third, Respondents attempt to draw a distinction between conduct that amounts to a violation of department policies and conduct that rises to the level of a violation of constitutionally protected rights. According to Respondents, because Officer O'Loughlin only violated departmental policies, this does not amount to a failure on the part of Jefferson County to punish the unconstitutional use of force. While this distinction certainly exists in theory, it is inapplicable to this case. O'Loughlin's past conduct certainly constituted a violation of department policies as well as a violation of the constitutional rights of inmates. That Jefferson County never considered such conduct serious enough to constitute a constitutional violation further evidences the inadequacy of Jefferson County's disciplinary procedures.

Finally, Respondents rely on sovereign immunity in response to Petitioner's claim that *respondeat superior* in the context of municipal liability should be reexamined. This Court has held that state sovereign immunity is insufficient to defeat a federal civil rights claim under 42 U.S.C. § 1983 against a municipality. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).

The Sixth Circuit incorrectly interpreted the rule of law set forth in *Brown*. Furthermore, the arguments advanced by Respondents indicate a fundamental misunderstanding of this Court's prior decisions, including *Brown*. This incorrect interpretation of *Brown* by both the Sixth Circuit and Jefferson County provides the most compelling reason for this Court to grant the Petition for Writ of Certiorari in this case. *Brown* must be clarified; otherwise, it will continue to be misinterpreted by courts and municipalities alike, to the detriment of § 1983 claimants and the constitutional principals they seek to protect.

For the reasons set forth in the Petition, Petitioner respectfully requests this Court issue a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on September 29, 1997.

Respectfully submitted,

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